NO. 3042

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

HELEN K. KINNEY,

Plaintiff in Error,

v.

OAHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

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BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This is an action of ejectment in which the plaintiff seeks to recover an undivided third of a portion of the land of Hanohano, in the City and County of Honolulu, Territory of Hawaii, claiming in her own right and as the heir of her brother, John Paalua, as "heirs of the body," in common with her aunt and uncle, Lydia Kamae Mahoe and George Kealohapauole, of their grandparents, Kahakuakoi (w) and Kealohapauole (k), her husband, under a devise in the will of Bernice Pauahi Bishop, the last of the Kamehamehas, who died October 16, 1884. Kahakuakoi died September 8, 1910, and Kealohapauole, her husband, died June 8, 1914, leaving as surviving chil-

dren, Lydia and George; a grandson, John Paalua, son of a daughter, Niulii, who died December 12, 1890, and her husband, Kahaleahu; and the plaintiff, claiming to be the child of said Niulii and Kahaleahu.

The specific provision of the will is as follows:

"Fifth: I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of thirty dollars ($30) per month, (not $30 each) so long as either of them may live. And I also devise unto them, and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue to go to my trustees upon the trusts below expressed." (Tr., pp. 79, 80.)

And by the 11th paragraph of the first codicil to this will it is provided:

"11th. I revoke so much of the fifth article of my said will as devises the land known as 'Mauna Kamala' to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will." (Tr., p. 87.)

The defendant claims title to the premises under a deed dated October 22, 1894, from Kahakuakoi, Ke-

alohapauole, George Kealohapauole and Lydia Kamae Kealohapauole to Mark P. Robinson, in which, in consideration of Five Dollars, the grantors quitclaimed to said Robinson

"All their right, title, interest and estate vested, contingent or in expectancy in and to all that tract of land known as Hanohano situated in the District of Ewa, in said Island of Oahu, being the same premises described in Land Commission Award 5930 to Puhalahua, being the same premises devised to the parties of the first part by the will of Bernice Pauahi Bishop. And also all of the tenements, hereditaments, rents, reversions, privileges, and appurtenances, and all of their right, title and estate in law or in equity, vested contingent or in expectancy, in and to said premises, or to the same appertaining." (Tr., pp. 96, 97.)

and under the foreclosure of a mortgage given by Kahakuakoi and Kealohapauole December 15, 1890, to Bishop & Company and a sale to Charles R. Bishop who quitclaimed his interest in said land on the 23rd day of October, 1894, to said Mark P. Robinson for $6000 (Tr., pp. 76, 77), and a conveyance, with warranty, from said Mark P. Robinson to the defendant for stock of the par value of $150,000 in the defendant company on February 12, 1897 (Tr., pp. 77, 97); but denied that the plaintiff was an heir of the body of Kahakuakoi and Kealohapauole, the defendant admitting that the plaintiff was a child of Niulii, who was the daughter of Kahakuakoi and Kealohapauole, but denying her legitimacy.

"On this issue of fact evidence was taken almost continuously from November 27, 1916, to January 2, 1917. * * * forty-nine witnesses were examined. On this question counsel spent nearly four days in summing up,"

the court finding that the plaintiff was the legitimate child of Niulii and Kahaleahu, born after their marriage. (Tr., pp. 28, 29.) The court also found (Tr., p. 26):

"Niulii was a kinswoman of Pauahi, a retainer about her house, and under the direct care and guidance of Pauahi. Niulii was a well-known young woman. As one witness puts it, 'She was a girl who could not be hid.' She was of the blood of the aliis."

The court also found that at the time of making the will the first takers and their children were dependent upon the testatrix "for their home and their subsistence." (Tr., p. 31.)

The court also found that John Paalua, brother of the plaintiff, died on or about February 12, 1915, leaving no issue, nor wife, nor mother, nor father, and that his interest passed to Helen and therefore she was entitled to an equal share with George Kealohapauole and Lydia Kamae Mahoe. (Tr., p. 20.)

The only question remaining is a question of law, whether the plaintiff took under the will of Mrs. Bishop, as an heir of the body of Kehakuakoi and Kealohapauole at the decease of the survivor Kealo-

hapauole with her brother, an undivided third of the property in question.

This is the only instance in which the words "heirs of the body" are mentioned in the will. There are two devises of land in fee simple in the will and codicils. In item 9th of the first codicil a devise is made to Samuel M. Damon of the Ahupuaa of Moanalua, "to have and to hold * * * to him, his heirs and assigns forever" (Tr., p. 87); and a residuary devise under the will "unto the trustees below named, their heirs and assigns forever." (Tr., p. 81.)

The devises of lands for life vary somewhat in form and may be classified under three classes:

(1) To husband and wife: First codicil, clause 4, to Kuaiwa (k) and Kaakaole (w), "to have and to hold for and during the term of their natural lives and that of the survivor of them; remainder to my trustees" (Tr., p. 86); First codicil, clause 5, to Kaluna (k) and Hoopii, his wife, "to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees" (Tr., p. 86);

(2) A devise, second codicil, clause 3, to Auhea (w), wife of Lokana, "to have and to hold for and during the term of the natural life of her, said Auhea, free from the control of her husband; remainder to my trustees."

(3) Devises in five slightly varying forms:

(a) "To have and to hold for and during the term of her natural life; and after her decease to my trustees," Will, clauses 4, 15.

(b) "To have and to hold for and during the term of (his or her) natural life; upon (his or her) decease to my trustees," Will, clauses 7, 8, 9, 10; First Codicil, clause 2. In the last two instances the word "and" is introduced before the word "upon."

(c) "To have and to hold for and during the term of her natural life; remainder to my trustees," First Codicil, clause 13; Second Codicil, clause 1.

(d) "To have and to hold for and during the term of the natural life of him, said Kapaa; remainder to my trustees," Second Codicil, clause 2.

(e) To her husband to whom in her will she had made under clause 9 numerous bequests under form (b), "to hold for his life, remainder to my trustees," First Codicil, clause 3.

The words "heirs of the body" and "upon default of issue" are not used elsewhere in the will. The trustees referred to were devisees of all the rest and residue of her estate, to whom it was devised to establish the Kamehameha Schools.

At the time of making the will, estates by the entirety were recognized in Hawaii, but estates tail had no place under the laws of Hawaii, and neither they nor fines and recoveries had ever been recognized in the history of the Islands; they were inconsistent. Its statutes conflicted with the idea of their existence, and the English system of common law was not adopted until nine years after the making of the will, and rules of property followed in England in the construction of wills were considered out of joint with the times, particularly where they

overruled the intention of the testator, as in the rule in *Shelley's Case.* (Frear, J. in *Rooke v. Queen's Hospital,* 12 Haw. 375.)

CLAIMS OF PLAINTIFF AND OF DEFENDANT.

Plaintiff's claim:

(1) That Kahakuakoi (w) and Kealohapauole (k) took under the devise an estate by the entirety for their joint lives and the life of the survivor.

(2) That the "heirs of the body of either" took a contingent remainder as tenants in common, which became vested at the termination of the estate for life by the entirety.

Defendant's claim, sustained by the court:

(1) That Kahakuakoi (w) and Kealohapauole (k) took under the devise two estates:

(a) An estate by the entirety for their joint lives and the life of the survivor.

(b) Subject to (a), Kahakuakoi and Kealohapauole took tenancies in common in tail.

(2) That the tenancies in common in tail were converted into tenancies in common in fee simple since a fee tail cannot exist under the laws of Hawaii, is repugnant to the Hawaiian conception of estates and to the Hawaiian statutes, so that as a result Kahakuakoi (w) and Kealohapauole (k) took tenancies in

common in fee simple, subject to an estate for life in themselves by the entirety.

(3) That the trustees took an alternative contingent remainder which vested "upon default of issue" of *either* living at the termination of the estate by the entirety for life.

(3) That the "heirs of the body of either" take nothing.

(4) That if an estate tail were created under the common law by the devise, under the decisions in *Nahaolelua v. Heen,* 20 Haw. 372, and *Boeynaems v. Ah Leong,* 21 Haw. 699, 242 U. S. 612, it would be converted into an estate for life in the first takers with a remainder in fee simple in the "heirs of the body of either."

(4) No claim as to the estate taken by the trustees.

As the husband and wife of the tenant entailed are entitled to curtesy and dower (2 Bl. 116), and as it is clear that the devise to the trustees does not take effect unless there are no heirs of the body of either, cross remainders would be implied (2 Jar.*

536, *Allen v. Trustees,* 102 Mass. 262), we restate what would happen under the respective claims of the parties:

Plaintiff's Claim.	Defendants' Claim.
1. Ka. and Ke. took a life estate by the entirety.	1. Ka. and Ke. took a life estate by the entirety.
2. The heirs of the body of either and the trustees took alternate contingent remainders, dependent upon their being heirs of the body of either at the decease of the survivor of Ka. and Ke.	2. Ka. and Ke. took tenancies in common in tail subject to (1).
	3. The spouse of Ka. or Ke. if another at the death of the survivor take an estate by curtesy or dower, as the case might be.
	4. Estates tail by way of cross remainder would be created in the respective heirs of the body of Ka. and Ke. on failure of the heirs of the body of either, with the incidents of curtesy and dower.

5. On the indefinite failure of issue of both Ka. and Ke., a contingent remainder to the trustees.

A complete and valid devise under Hawaiian law, to the persons Mrs. Bishop intended to benefit.

6. That as all the claim excepting (1) is void under the Hawaiian law, in place of what Mrs. Bishop intended, the law will construe the devise as a fee simple, which she did not intend, and convert the contingent remainder to the trustees into an executory devise, subject to the dower or curtesy of any surviving spouse of the survivor.

The claim of the defendant was not sustained by the Circuit Court, which apparently decided the case on the theory that at common law an estate tail could be docked by the tenant's conveyance, an obvious error, but was sustained by the Supreme Court of Hawaii. Neither the defendant nor the latter court defined the estate the trustees would take, whether by way of remainder or executory devise, whether at the termination of the life estate by the entirety, upon default of issue, or upon an indefinite failure of issue, whether upon default of issue of one

of the tenants in common, the trustees took at the decease of that tenant, subject, in case one of the spouses survived to his or her estate; or whether it was upon failure of issue of both, and whether that failure was upon a definite failure or an indefinite failure of issue. These questions the court disposed of by saying:

"As this case does not involve a controversy between two different sets of heirs of the first takers, it is a matter of academic interest only as to how the heirs of one spouse, who were not also heirs of the other, had there been such, would have taken." (Tr., p. 49.)

holding that the words "of either" required a construction that the separate heirs of the body of either would take, but finding it unnecessary to decide how.

It will be seen that under the claims of both parties and under the decision of the Supreme Court of Hawaii, the immediate estate is a life estate by the entirety in the first takers.

ASSIGNMENTS OF ERROR.

(1) The Supreme Court of Hawaii erred in affirming the judgment of the Circuit Court in favor of the defendant, and not reversing that judgment and ordering judgment in favor of the plaintiff as prayed for, and directing the amount of mesne profits to be ascertained, and that judgment be entered therefor for plaintiff and against defendant.

(2) The court erred in holding that the devise in question unto Kahakuakoi and Kealohapauole, her husband, "unto them and to the heirs of the body of either" and "upon default of issue the same to go to my trustees" did not create a life estate or estates in the said Kahakuakoi and Kealohapauole, her husband, and a remainder over.

(3) The court erred in holding that the word "either" does not refer to the first takers or necessarily affect the estate devised to them.

(4) The court erred in holding that there is no reason why an estate by the entirety in tail with several inheritances cannot be created.

(5) The court erred in holding that it is of no practical importance in this case whether the first takers be regarded as being tenants by the entirety, joint tenants or tenants in common, in holding that it is a matter of academic interest only how the heirs of one spouse who were not also heirs of the other would have taken, and in holding that the will is to be construed with reference simply to conditions as to issue which have eventuated and not to conditions which might eventuate under the will as made by the testatrix.

(6) The court erred in holding that the words "of either" express the intention to create an estate tail general, and that the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during the life of the surviving spouse.

(7) The court erred in holding that the devise

over to the trustees upon default of issue does not militate against the theory of an estate of inheritance, in that the court entirely overlooked the fact that the devise over is in default of issue of either, and that if either left issue that issue would take the entire property, and as the separate issue of one could not inherit from the other as heirs of the body of that other, that the separate issue of the one must take by remainder and not by inheritance, and in failing to give effect to the words of the testatrix, viz., "and to the heirs of the body of either" and the devise over to the trustees "in default of issue," evidently meaning issue of either, which conclusively show that the testatrix intended title to the property to be transmitted, after life estates by the entirety in the first takers, to persons who could not take by descent, and further erred in holding that this intention of the testatrix (found by the court) that the separate heirs of the body of each, as well as the joint heirs of both, are to take, can be effectuated by an estate by the entirety for life in the first takers and several inheritances, since the intention of the testatrix is clear that the devise over to the trustees shall not take effect so long as there are heirs of the body of either, separate or joint, and as the separate heirs of the body of one cannot take by descent the separate inheritance of the other, this intent of the testatrix can only be effective by an estate by the entirety for the lives of the first takers and a remainder to the heirs of the body, whether separate or joint, of the first takers.

(8) The court erred in refusing to hold that the natural and plain meaning of the language employed by the testatrix is that an estate by the entirety having been created, at the decease of the survivor the entire estate would pass to the heirs of the body of either in case either left heirs of the body, whether heirs of the body of the survivor or not, an intent clearly incompatible with an intent to create an estate tail.

(9) The court erred in holding that the word "limited" in the codicil and the fact that the annuity is granted for life have no bearing on the construction of the devise in question.

(10) The court erred in holding that the presumption that a testator intended a legal estate rather than an illegal one has no bearing on the question, and in holding, without evidence, that "an impression seems formerly to have existed—how prevalent it was we do not know—that fees tail could exist here," and in holding that there is in this case an unmistakable intent to create a fee tail.

(11) The court erred, while holding the cases of *Nahaolelua v. Heen* and *Boeynaems v. Ah Leong* to be rightly decided and reaffirming the ruling made therein that "when a futile attempt has been made to create an estate in fee tail it will take effect either as a fee simple or a life estate and remainder according to which appears to more nearly effect the intention of the grantor or testator," in holding that ordinarily such estate "will be held to take effect as

a fee simple unless something appears which should send it the other way."

(12) The court erred in holding that in the case at bar "there is nothing tending to show a preference for a life estate and remainder," since the will provides and the trial court found that the testatrix intended, at the death of the first takers, the heirs of the body of either to take an interest which they could not take by descent, and this even under the theory of the defendant, since upon the failure of the heirs of the body of one tenant in common, that interest would pass to the separate heirs of the body of the other by some form of remainder.

(13) The court erred in holding that it must affirmatively appear that in the particular case a life estate and remainder would more nearly comply with the ultimate disposition of the property and the direct benefits to be conferred thereby which the grantor or testator had in mind, or the devise will be held to take effect as a fee simple in the first taker, in that the same is inconsistent with the ruling of *Nahaolelua v. Heen* and *Bocynaems v. Ah Leong,* reaffirmed in this case, that the estate will be held to be one or the other "according to whether the one effect or the other will go merely towards carrying out the intention of the grantor or testator in each case."

(14) The court erred in holding that the principles of the common law should be applied to test the character of fee tail estates in Hawaii, and particularly in ignoring the fact that an estate in tail in

Hawaii could not be barred or conveyed by the first taker or that there are any provisions of the common law which would be in force under the law of Hawaii which would favor the first taker.

THE HAWAIIAN LAW WHICH MUST GOVERN THE INTERPRETATION OF THIS WILL.

"* * * in the year 1827 there was no fixed or uniform law of inheritance in the Kingdom, such as has existed here for the last twelve or fifteen years. At the same time, however, it seems abundantly clear that among the higher class of chiefs at least, the possession and use of lands usually descended from one set or generation of holders to another. That is to say, upon the death of a landholder the possession of his lands was not ordinarily resumed or appropriated by the King. The fact of a general transmission of the possession of lands seems well established, although such transmission was not governed by well defined rules or uniform custom."

L. Keclikolani v. James Robinson, 2 Haw. 514, 542.

As John Ricord, the first distinguished lawyer of Hawaii and drafter of many of its early statutes, says in the preface of the Statute Laws of Kamehameha III, 1846:

"The bill of rights, proposed and signed by His Majesty on the 7th of June, 1839, was the first essential departure from the ancient despotism. The constitution which he voluntarily conferred on the peo-

ple on the 8th of October, A. D. 1840, recognizes the three grand divisions of a civilized monarchy, king, legislature and judges, and defined in some respects the general duties of each. These however, were so engrafted on the ancient form of government that there seemed to be a blending of their separate functions, requiring the aid of organic acts, limiting their usual spheres, in order to secure the civil liberties intended to be conferred upon the people. The constitution had not been carried into full effect. Its provisions needed assorting and arranging into appropriate families, and prescribed machinery to render them effective."

and again (page 5):

"As results of missionary labor, however, the ordinances have been greatly serviceable in preparing the nation for what has since become indispensable to its political existence—a complete code of laws * * *"

The Bill of Rights, after declaring that:

" 'God hath made of one blood all nations of men to dwell on the earth,' in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands."

declared that:

"Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to

the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws."

Thurston's Fundamental Law, p. 1.

The Constitution, in an "exposition of the principles on which the present dynasty is founded" recites:

"The origin of the present government, and system of polity, is as follows. KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey the smallest portion of land without the consent of the one who had, or has the direction of the kingdom."

Thurston's Fund. Law, p. 3.

The Act creating the Board of Commissioners to quiet land titles, passed December 10, 1845, was based quite largely on similar provisions by the Congress of the United States, one of which settled the constitutional land grants in California, provided (Sec. 7) that if claims were not presented they should be forever barred, and by Section 13, that titles awarded should be deemed forever settled.

Thurston's Fund. Law, 138.

In the principles adopted by the board which had

the force of law, the history of land tenures is recited showing as a result that the King really owned the allodium and always had the right of its possession until the Declaration of Rights and the Constitution. The King voluntarily relinquished his rights and interposed in the commission his power to confer and convey land as a private and fiduciary right which are now held "by a tenancy incomprehensible to the foreigner," and being desirous to conform in the main to a civilized state of things.

Thurston's Fund. Law, 140, 154.

"The real foundation of settled titles seems to have been the establishment of the Land Commission in 1845."

Thurston v. Bishop, 7 Haw. 421, 428.
Lewers & Cooke v. Atcherley, 222 U. S. 285.

The judicial history of Hawaii which begins with the Constitution of 1840 is one of which she is proud. It extends back farther than that of any state west of the Mississippi except Louisiana, Missouri, Arkansas and Iowa, and its early thought was dominated by Christian missionaries who had implanted their high ideals in its laws, its justice, its human relations, into the very life of that nation. In the Third Act of Kamehameha III, 1847, reorganizing the judiciary department, it was provided that

"The reasonings and analogies of the common law and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed

to be founded in justice, and not at conflict with the laws and usages of this kingdom. The principles sustained by said courts when sanctioned by the supreme court, shall become incorporated with the common law of the Hawaiian Islands, and shall form an essential ingredient in the civil code: Provided always, that the legislative Council of Nobles and Representatives, may by act sanctioned by His Majesty, and duly promulgated, correct, alter, or abrogate the principles of such abstract judgments and decisions, in analogous cases afterwards to arise before said courts, or any of them."

and this in substance was incorporated into the Civil Code,

"Sec. 14. The Judges have equitable as well as legal jurisdiction, and in all civil matters, where there is no express law, they are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries."

"Sec. 823. The several courts may cite and adopt the reasonings and principles of the admiralty, maritime, and common law of other countries, and also of the Roman or civil law, so far as the same may be founded in justice, and not in conflict with the laws and customs of this Kingdom."

It was not till long after the death of Mrs. Bishop "that the common law of England as ascertained by English and American decisions" was declared to be the common law of the Territory of Hawaii "except as otherwise expressly provided by the constitution or laws of the United States or by the laws of the Territory of Hawaii or fixed by Hawaiian judicial precedent or established by Hawaiian usage." (Act Nov. 25, 1892; took effect Jan. 1, 1893.) R. L. Haw. 1915, Sec. 1.

THE DECISION OF THE COURT.

The Circuit Court and the Supreme Court both held that the Testatrix did not intend to create a fee simple in the first takers (Tr., pp. 32, 33, 34, 46); that the devise created an estate by the entirety in them (Tr., pp. 32, 48); that she did not intend that their heirs general should take (Tr., pp. 32, 46), but that the words "heirs of the body" must receive their technical meaning as words of limitation, importing inheritance, unless from subsequent inconsistent words it is made perfectly plain that the testator meant otherwise (Tr., p. 47). That the use of the words "of either," although clearly showing an intention that the heirs of either spouse by another would take, are not sufficient to show that Kahakuakoi and Kealohapauole took a life estate, the court saying:

"The word 'either' does not refer to the first takers or necessarily affect the estate devised to them. It

relates only to the inheritance. There is no legal obstacle to the creation of a joint estate in fee tail or fee simple with several inheritances. 2 Jarman on Wills (6th ed.), 267; Ex parte Tanner, 20 Beav. 374, 52 Eng. Rep. 647; *Doe v. Green,* 4 M. & W. 229, 150 Eng. Rep. 1414. And we see no reason why the principle should not apply in the case of an estate by the entirety in tail. It is really of no practical importance in this case whether the first takers be regarded as having been tenants by the entirety, joint tenants or tenants in common, and as this case does not involve a controversy between two different sets of heirs of the first takers it is a matter of academic interest only as to how the heirs of one spouse who were not also heirs of the other, had there been such, would have taken. We think, however, that the contention of counsel for the defendant in error that without the words 'or either' the descent would have been limited to the heirs of the joint bodies of the first takers, thus creating an esate tail special, and that that word was used to express the intention to create an estate tail general is sound. Under this theory the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during the life of the surviving spouse. It is to be noted, in this connection, that in the clause in question no words of separation or futurity were used to draw a line of demarcation between the estate of the first takers and that of the heirs. The devise over to the trustees upon default of issue does not militate against the theory of any estate of in-

heritance. It is not only feasible to limit a remainder after an estate tail upon failure of issue, but, in order to complete the testamentary disposition, is the natural thing for a testator to do."

In order to determine exactly what the court means by this, it is necessary to analyze the opinion and in so doing, to anticipate a portion of the argument, thus, the portion of the excerpt down to *Doe v. Green,* apparently says four things:

1. "The word 'either' does not refer to the first takers."
2. Does not "necessarily affect the estate devised to them."
3. "It relates only to the inheritance."
4. "There is no legal obstacle to the creation of a joint estate in fee tail or fee simple with several inheritances."

When, however, we examine the citations, we find by the reference to 2 Jar.* 252, that the estate which is created is not "a joint estate in fee tail * * * with several inheritances," but that "the devisees are *joint tenants for life,* with several inheritances in tail," or as Underhill puts it, a devise to A and B and the heirs of their bodies where A and B are not husband and wife and cannot become such,

"In such case they are joint tenants for life, but tenants in common by necessity in respect to the estate tail." (2 Underhill Wills, Sec. 536.)

while in Ex parte Tanner, the words used in a like case were "the heirs of their respective bodies lawfully issuing" and the Master of the Rolls, Sir John Romily, citing Littleton's Tenures, s. 283, to the general rule, held that he

"must confine the application of the word 'respective' to the inheritance given after the estate to the children. If the devise had been to the children and the heirs of their bodies respectively, I should have held them *tenants in common in tail.* Here the expression 'respective' is limited to the inheritance, and these are fit words to create a joint estate *for life,* with several estates of inheritance in tail."

While in *Doe v. Green* the devise was to two nieces "equally between them to take as joint tenants and their several and respective heirs and assigns forever," and the court said:

"But we are of opinion that due effect may be given to all the words in this devise, by deciding that the devisees, the nieces, *took an estate for their joint lives and the life of the survivor, that is,* as joint tenants *with remainder to each of them as tenants in common* in fee after the death of the surviving life; in other words, that they took as tenants in common in fee, subject to an estate for their joint lives, and the life of the survivor."

Doe v. Green, 4 M. & W. 229, 150 E. R. 1414, 1419.

The result is that instead of a joint estate in fee

tail with several inheritances, the devise claimed, if the case relied on by the court apply, would constitute Ka. and Ke. "joint tenants with a remainder to each of them as tenants in common after the death of the surviving life." In other words, (4) must be restated as follows: "There is no legal obstacle to the creation of a joint estate *for life with a remainder* to the joint tenants for life as tenants in common, either in fee tail or fee simple."

Again, these cases show that the word "either" does refer to the first takers and necessarily affects the estate devised to them and does not relate only to the inheritance, since these words change what would be an estate in fee tail or fee simple into an estate for life with remainder in fee tail or fee simple.

The rest of the citation contains five additional propositions.

(5) There is no legal obstacle to the creation of an estate by the entirety in tail with several inheritances.

(6) It is not necessary to consider whether the first takers were tenants by the entirety, joint tenants, or tenants in common, and as there is no controversy between different sets of heirs "it is a matter of academic interest only as to how the heirs of one spouse, who are not heirs of the other, had there been such, would have taken."

(7) The words "or either" change what would have been an estate tail special into an estate tail general.

(8) No words of separation or futurity between the estate of the first takers, and that of the heirs.

(9) The devise over to the trustees in default of issue does not militate against the theory of an estate of inheritance.

We will show in the argument that (5) is not supported and is inconsistent with the authorities.

As to (6), it is elementary that what might happen under the devise as well as what did happen, must be considered in order to get at the mind of the testator.

Judge Frear has well said on this point:

"In order to solve these questions it is necessary to consider not merely the circumstances as they happen, but circumstances that might have happened and to construe the will placing themselves in the position of the testator who presumably intended to provide for such contingencies as might happen but could not foresee just what in particular would happen."

Rooke v. Queen's Hospital, 12 Haw. 375, 379.

We have already shown that as to (7) the words "of either," according to the decision of the court, do not change an estate tail special into an estate tail general; but change the devise to the first takers into a devise by the entirety for life, and then segregate the remainder into tenancies in severalty each in fee tail general.

As to (8) there are "words of demarcation" which

import futurity in this devise not found in the devisees in fee simple elsewhere, in the will, namely, the words "and to."

And as to (9) the court by converting the estate into a fee simple, necessarily convert the remainder to the trustees, which they say "is a natural thing" into an executory devise, which is not natural, for courts will always construe a devise as a remainder rather than an executory devise.

The Supreme Court gave no weight to the surrounding circumstances to which the court below ascribed importance, particularly their dependence upon the testatrix's bounty for home and subsistence when the will was made, and the relationship between her and the first takers and the children of the first takers. It was further held that the provision giving power to the devisees for life to make leases good for ten years, tends to show that a life interest was not given (Tr., p. 51).

Notwithstanding the declaration in the Rooke case, in the opinion by Judge Frear, the learned counsel for the defendant in this case, that "we find no instance of the recognition of the estates tail or of their concomitants, such as fines and common recoveries, in the history of these Islands (*Rooke v. Queen's Hospital,* 12 Haw. 365, 391), reaffirmed in the *Nahaolelua v. Heen,* 20 Haw. 372, and in *Boeynaems v. Ah Leong,* 21 Haw. 699, in which latter decision the writer of this opinion joined, the court below says in regard to the presumption that the

testator intended a legal estate, rather than an illegal one:

"The presumption does not operate with much force in the case at bar since an impression seems formerly to have existed—how prevalent it was we do not know—that fees tail could exist here, and there was no reported ruling to the contrary till the case of *Rooke v. Queen's Hospital* was decided in 1900. In a jurisdiction where fees tail have been abolished, the courts would be slow to construe a will executed after the abolition as intending to create such an estate. Such an intention would not be implied."

Reaffirming *Nahaolelua v. Heen,* 20 Haw. 372, and *Boeynaems v. Ah Leong,* 21 Haw. 699, the court goes further and holds that a deed or devise to A and the heirs of his body "ordinarily will be held to take effect as a fee simple unless something appears which should send it the other way," and that in this case there is nothing tending to show a preference for a life estate and a remainder (Tr., pp. 55, 56, 57) and the fee tail should be declared to be a fee simple

"because both are estates of inheritance and belong to the same genus; both, at common law, were subject to the incidents of dower and curtesy, and were without impeachment of waste; the tenant in tail could bar the entail; an estate tail, in point of law, bears little resemblance to a life estate and remainder; and the law generally favors the first taker. In

short, in such a case as this, a holding that the first taker shall have an estate in fee simple will go as near as may be under the law toward effectuating the futile intent to create an estate tail." (Tr., p. 57.)

ARGUMENT.

I.

THE DECISION OF THE COURT BELOW IS ERRONEOUS, BECAUSE IT CONSTRUES BY AN ARTIFICIAL AND TECHNICAL COURSE OF REASONING, THE PROVISION WHICH THE TESTATRIX INTENDED TO MAKE, AS AN INVALID GIFT, WHICH IT PROCEEDS TO CONVERT INTO AN ENTIRELY DIFFERENT VALID GIFT, WHICH THE TESTATRIX DID NOT INTEND TO MAKE.

It construes the provision in the will of a typical Hawaiian as creating an estate which was never a part of its system of law; is repugnant to its policy of the free alienation of property; was never recognized in the history of the Islands, and which conflicts in important respects with its statutory law, although the devise can easily be construed as a legal devise providing for the beneficiaries who were in the mind of the testatrix.

We have shown that the court's construction of the immediate devise is identical with our own, that Kahakuakoi and Kealohapauole took under it a life estate by the entirety, but instead of construing the reversionary estate as being what the will says "to

the heirs of the body of either, * * * upon default of issue, the same to go to my trustees," a valid devise which provides for the three classes which the testatrix had in mind, namely, the parents, the heirs of the body of either, and the trustees, the court applied technical rules of the common law, not in force in Hawaii, and assumes that the testatrix intended a remainder in the dead husband and dead wife, in the form of a tenancy in common in tail, a void estate which has no place under the law of Hawaii; was never a part of its system or imported into these Islands; which is abhorrent to the general movement of thought in regard to land titles; repugnant to the Hawaiian policy of free alienation; was never recognized in the history of the Islands and conflicts with its statutes (*Rooke v. Queen's Hospital,* 12 Haw. 375, 391), and this estate implied by the court would have as its concomitants, curtesy and dower in persons not contemplated by the will as recipients of the testatrix's bounty, viz: the husband or wife of the survivor, would necessitate remainders in tail in the respective heirs of the body of Kahakuakoi and Kealohapauole on the failure of heirs of the body of the other, and would also necessitate the conversion of the estate tail into a valid estate and of the contingent remainder to the trustees, which would then arise on an indefinite failure of issue, into an executory devise.

(a) *Where a devise is susceptible of two reasonable constructions one of which is in contravention*

of law, statutory or general, and the other not, the latter will be preferred, if possible without doing violence to the testator's purpose.

The courts have often laid down this rule in cases where the statute against perpetuities was involved.

"In determining these unadjudicated questions we do not feel at liberty to be unmindful of the statute against perpetuities, and the construction which as the result of repeated decisions is now given to it. While bound to thus recognize the statute in arriving at our independent conclusions, we are also required to apply to the construction of the testator's testamentary provisions the presumption that they were not violative of the law, and to construe them in the light of that presumption, so that if his language is susceptibe of two reasonable constructions, one of which is in contravention of the law, and the other not, the latter will be preferred."

Farnam v. Farnam, 83 Conn. 369, 77 Atl. 70, 74.

"Where one proposed construction of an ambiguous provision assumes an intention to make an unlawful gift, while another does not, the latter will be accepted, if possible, without doing violence to the testator's purpose."

Porter v. Union Trust Co., 182 Ind. 637, 108 N.E. 117.

"When by an artificial and technical course of reasoning the invalid gift which the testator intended to make is converted into an entirely different valid gift which the testator did not intend to make, the result is a very gross injustice and a violation of the rights involved in the testamentary disposition of property."

Hewitt v. Green, 77 N. J. E. 345, 77 Atl. 25, 28.

"If two constructions may be put upon a provision in a will, one of which will violate an inflexible rule of law and the other not, the construction which will not offend the rule is to be adopted by the court. 1 Perry on Trusts, 381; *Martelli v. Holloway,* L. R. 5 H. L. 532."

Towle v. Doe, 97 Me. 427, 54 Atl. 1072, 1074, 1075.

"All the authorities agree that in ascertaining the intention of the testator all the provisions of his will should be examined, so as to ascertain his general purpose, and unless the plain import of the words demands otherwise they should be so construed as to be consistent, each one with all the others and not *in violation of law, statutory or general.*" (Mr. Justice Harlan.)

M'Graw v. M'Graw, 176 Fed. 312, 319.

"It is always assumed, as a rule of construction, that the testator knew the law, and we are also to assume that he desired to make legal and effectual disposition of his property. If therefore the language used by him is capable of a reading consistent

with the law, it is our plain and imperative duty to give it that reading."

Du Bois v. Ray, 35 N. Y. 162, 171.

So under a will which could be construed as providing for an ultravires gift to the beneficiary, Mr. Justice Holmes says:

"But, furthermore, we are not to construe the will as imposing a condition which is contrary to law, unless the language plainly has that meaning. *We are not to assume without necessity that the testator either was ignorant of pretty obvious law, or defied it in shaping the conditions of a scheme which he was anxious to have carried out.*"

Quincy v. Attorney General, 160 Mass. 431, 35 N. E. 1066, 1068.

(b) *This rule has been applied by the courts in holding that a devise should not be held to create an estate in fee tail where such an estate is not valid.*

Thus in Illinois a devise to A and his heirs forever with a further proviso that should he die "without heirs of his body" the estate should go to his surviving brothers and sisters, the court held that the devise was plainly of a fee determinable upon his dying without heirs of his body, but the court continued:

"There is, moreover, in our opinion, a reason sustaining this view in this state which does not exist

where, as at common law, estates tail are recognized. We have no estates tail; but, on the contrary, where an instrument is executed which would at common law be held as vesting an estate tail, our statute declares it shall only vest a life-estate in the grantee or donee in tail, and the remainder in fee in the designated heir or heirs. Section 6, c. 30, Rev. St. 1874. *It would then seem that it violates the plainest principles of construction to hold that language in a will which can only vest a life estate in the first taker, and a remainder in fee in the next, was intended to vest an estate tail, merely because, if that language had been employed where estates tail are recognized, it would have vested such an estate. It does not have that effect here, and, in the absence of anything appearing to the contrary, language must be presumed to have been intended to have the legal effect which the law assigns to it.*"

Summers et al v. Smith et ux., 127 Ill. 645, 21 N. E. 191, 192.

In a Georgia case where a similar question was involved, it is said:

"The question is whether he intended to create an estate tail, which is prohibited by the law of Georgia, or an estate in remainder, which is legal. Even if there be any doubt, shall this court construe those words so as to attribute to the testator the intention of doing a forbidden thing, and therefore by legal effect accomplishing a result which would have been

reached without the use of the words above quoted at all?"

Cooper v. Mitchell Investment Co., 133 Ga. 769, 66 S. E. 1090.

"Estates tail are lawful in Great Britain, and the word *heirs, heirs of the body,* etc., have a fixed technical meaning; and, therefore, when, in that country, such words are used in an instrument of conveyance, presumptions may favor these estates. But such estates are prohibited in Georgia—these words are, by legislation, as it were, deprived of that settled signification; and therefore, presumption will not here, readily favor such estates."

Robert v. West, 15 Ga. 122, 145.

"We cannot therefore by construction turn a life estate into an estate tail, and then give it up to the operation of the act of 1784, and thereby entirely defeat the intention of the devisor."

Jarvis v. Wyatt, 11 N. C. 227.

So the Texas court said:

"In the states that have inhibited entailment, the words 'heirs of the body' are not strictly technical, because they are not appropriate words to create any estate recognized by law. *Jarvis v. Wyatt,* 4 Hawks, N. C. 227. In this state it is not even necessary to use the words 'Heirs' to create an estate in fee."

and in reference to whether the words "lawful issue" should be presumed to be words of limitation and not

of purchase, the same court further said such presumption

"is to make the donor do that which is in violation of law, in making an estate tail (which will not readily be presumed. See 15 Ga. 145-6.)"

Hancock v. Butler, 21 Tex. 804, 811, 817.

In Kentucky, the court said of a devise to "J. W. and to the heirs of her body by I. W.",

"Estates tail are forbidden by our law, and hence, although the language appears to create such an estate, yet if any other construction will not necessarily distort the meaning of the words used, it will be adopted."

Brown v. Elzey, 83 Ky. 440, 443.

The court held that "heirs of her body by I. W." meant children who therefore took in *praesenti* with their mother.

(c) *The rule should be applied even more rigorously to the will of a Hawaiian, who was the last of the Kamehamehas.*

We submit to the court in this case a very serious error on this point. While admitting that "In a jurisdiction where fees tail have been abolished the courts would be slow to construe a will executed after the abolition as intending to create such an estate," it is said that this presumption "does not operate with much force in the case at bar since an im-

pression seems formerly to have existed—how prevalent it was we do not know—that fees tail could exist here." Against this statement of an alleged impression, of which the court does not seem any too sure; of which there is no evidence in the record, of which we can find no recogniton in the judicial history of Hawaii, we place the language in the Rooke case of the leading counsel for the defendant in an opinion concurred in by at least one Judge who was in the full tide of practice in Hawaii when the will was written, and we strenuously urge that the opinions of judges who practiced at the bar of Hawaii before the common law was adopted, are of more value than those who had not that experience.

"We have no hesitation in holding that estates tail have no place under the laws of Hawaii. It is true, as contended, that ancient Hawaiian land tenures bore a striking resemblance to those which prevailed in Europe in feudal times. A feudal system, not the feudal system of early English history, grew up in these Islands. Estates tail were never a part of that system. Even in England they were of statutory origin. Nor was the English system ever imported into these Islands. On the contrary the movement was in the opposite direction, as shown, among other things, by the establishment of the Land Commission in 1846 for the purpose of awarding titles in fee simple and abolishing what then remained of the Hawaiian feudal system. Estates tail are repugnant to the policy of the free alienation of

property and have generally been considered out of place in the United States and have been abolished by statute or not recognized by the courts in most of the States and our early settlers from New England, here one remove further from old England, would not have been likely to introduce estates tail even if they had brought with them the main body of their laws and customs and established a colony of their own, instead of becoming themselves practically incorporated in the Hawaiian nation and merely exercised an influence, important though it was, upon Hawaiian legislation, customs and ideas. Accordingly, we find no instance of the recognition of estates tail or of their concomitants, such as fines and common recoveries, in the history of these Islands. On the contrary, as pointed out by counsel, statutes have been enacted, which in important respects conflict with the idea of the existence of estates tail. For instance, the disposition of property at death is provided for as follows: 'Every person of the age of eighteen years and of sound mind may dispose of his or her estate both real and personal by will.' Civ. L., Sec. 2122. The owner of an estate tail could dispose of it by will under this statute. But at common law estates tail could not be disposed of by will. 'Whenever any person shall die intestate within this Republic, his property, both real and personal, of every kind and description, shall descend to and be divided among his heirs as hereinafter prescribed.' Civ. L., Sec. 2105. Upon the decease of the owner of an estate tail intestate it would go to his heirs

general under this statute. But it is of the very essence of an estate tail that it shall go to heirs special. An estate tail is an estate from which the heirs general and the power of alienation are tailed or cut off. In the case of an estate tail, the issue take, if at all, by descent, and not under the will of the creator of the estate, and if they take by descent they must take under the statute of descent, and a testator cannot by attempting to create an estate tail,alter the statute of descent by prescribing a course of descent inconsistent with that prescribed by the statute. In the case of an estate tail general, it is true, the heirs special, that is, the heirs of the body, if any, would, under our statutes, be the heirs general, and the estate would descend here as at common law so long as it lasted, that is, so long as such heirs lasted, to the heirs general, although such heirs would not be the same persons or take in the same manner here as at common law, where males were preferred to females, and the eldest male and his male descendants to the younger males, and all descendants, who took at all, took *per stirpes,* though of the same degree; and upon the failure of such heirs, that is, upon the termination of the estate, there would be nothing to go to the heirs general, that is, the collateral heirs or lineal ascendants. But in most cases of estates tail male or female or special, the heirs special would not be the heirs general and the course of descent indicated by the will would conflict with that prescribed by the statute. Under

similar statutory provisions it was held that estates tail could not be created in New Hampshire. *Jewell v. Warner,* 35 N. H. 176."

Rooke v. Queen's Hospital, ubi supra.

Again the same learned judge in holding that the common law rule requiring the use of heirs in a deed was not a law in Hawaii before the adoption of the common law rule, says:

"That rule was a relic of the feudal system and grew up under conditions that no longer exist in England and never existed in these Islands as it did in England. It is now regarded as purely technical, and its chief effect seems to be to defeat the intention of the parties."

and after referring to the rule of construing ancient conveyances by the courts of Massachusetts, without regard to this rule of the common law, he cites *Cole v. Lake Co.,* 54 N. H. 242:

"They who brought the general body of the common law with them to this region might well have omitted to bring the feudal rule, not because it was fabricated in a barbaric age, but because it was designed and fitted to perpetuate a barbaric condition; not because it originated in a foreign land, but because it was not suited to the commonwealth which our foreign ancestors came to this country to organize."

and then adds:

"The New Englanders who early settled here did not come as a colony or take possession of these Islands or bring their body of laws with them, though they exercised a potent influence upon the growth of law and government. The ancient laws of the Hawaiians were gradually displaced, modified and added to. The common law was not formally adopted, until 1893, and then subject to judicial precedents and Hawaiian national usage. Prior to that time the courts were at first without statutory suggestion as to what law they should follow in the absence of statutes, and later were expressly permitted by statute to appeal to 'natural law and reason, or to received usage, and * * * the laws and usages of other countries' and 'to adopt the reasonings and principles of the admiralty, maritime, and common law of other countries, and also of the Roman or civil law, so far as * * * founded in justice, and not in conflict with the laws and customs' of this country. See Civ. Code, Secs. 14, 823. The courts usually followed the common law when applicable. But they felt free to reject it, and did as a rule when, as in the present case, it was based on conditions that no longer exist, and when it had come to be generally recognized as merely technical and subversive of justice or the intentions of the parties to instruments and when it had in consequence been generally altered or abrogated by statute elsewhere. The question here, unlike that in the United States, was not whether the court should decline to follow a rule, but whether it should adopt a rule. The reason for giv-

ing effect to the clear expressed intention and for not adopting technical rules, especially when they are practically obsolete and founded on conditions that never existed here, is greater in the case of Hawaiians and Hawaiian deeds than in the case of English-speaking people and English deeds. See *Haalelea v. Montgomery,* 2 Haw. 62; *Kekuke v. Keliiaa,* 5 Ib. 437. Among the cases in which the court has declined to follow the common law as to real property the following may be mentioned: *Wood v. Ladd,* 1 Ib. 17, seal not essential to a mortgage; *Campvell v. Manu,* 4 Ib. 459, seal not essential to a deed; (see also *In re Congdon,* 6 Ib. 633, seal not essential to a bond); *In the matter of Vida,* 1 Ib. 63, dower in leasehold estate of long duration; *Kuuku v. Kawainui,* 4 Ib. 515; *Puukaiakea v. Hiaa,* 5 Ib. 484, and *Kuuku v. Kawainui,* 4 Ib. 515, conveyance of freehold *in futuro*; (see also *Judd v. Hooper,* 1 Ib. 13, livery of seisin); *Awa v. Horner,* 5 Ib. 543, deed to two or more creates tenancy in common; *Thurston v. Allen,* 8 Ib. 392, same as to tenancy in common, also *Rule in Shelley's Case* not law here; *In re Keliiahonui,* 9 Ib. 6; *Mossman v. Government,* 10 Ib. 421, and *Ninia v. Wilder,* 12 Ib. 104, conveyance by disseissee valid; *Rooke v. Queen's Hospital,* 12 Ib. 374, estates tail and fees simple conditional cannot exist here. See also *Kake v. Horton,* 2 Ib. 209, damages for death by wrongful act; (see also *Puuku v. Kaleleku,* 8 Ib. 80); also *The King v. Agnee,* 3 Ib. 106, and *The King v. Robertson,* 6 Ib. 718, practice in criminal cases."

Branca v. Makuakane, 13 Haw. 499, 504.

If then "where fee tails have been abolished the courts would be slow to construe a will executed after the abolition as intending to create such an estate" and "such an intention would not be implied," ought not the presumption to operate with much more force in the case at bar where the court is construing the will of the last of the Kamehamehas, a typical Hawaiian, and not impute to her a knowledge of that feudal system which was never a part of the Hawaiian and an intention to create an estate "repugnant to the policy" of Hawaii, of which there is "no instance of the recognition in the history of these Islands; and which conflicts with its early statutes? We submit that the supposition of the court is incredible, that Bernice Pauahi Bishop's intent was to create an estate of which she knew nothing, of which there has been no instance in the Islands, which was foreign to her ideas, with all the technical concomitants which the necessities of the English feudatory system had surounded it. Even in the case of Doctor Rooke, who was an Englishman, and who undoubtedly knew of the estate, where the court held that the devise would create an estate tail at common law, the court did not impute to him such an intent.

II.

AT COMMON LAW THE DEVISE WOULD CREATE AN ESTATE BY THE ENTIRETY FOR LIFE IN THE FIRST TAKERS, WITH ALTER-

NATE CONTINGENT REMAINDERS AT THE TERMINATION OF THE LIFE ESTATE IN THE THEN SURVIVING HEIRS OF THE BODY OF EITHER OR IN THE TRUSTEES, AS THE CASE MIGHT BE.

(a) *The decision necessarily holds that an estate by the entirety for life was created in Kahakuakoi (w) and Kealohapauole (k).*

This is the necessary result from the cases cited by the court. The decision, after declaring that "the first takers being husband and wife, presumably took by the entirety: *Robinson v. Aheong,* 13 Haw. 196," cites 2 Jar. on Wills, 252, Ex parte Tanner, and *Doe v. Green,* to the point that the joint estate in fee tail or fee simple may have several inheritances, and then sees no reason why it should not be applied to an estate in the entirety. But as we have already shown, Jarman and the cases cited show that the estate as construed by the court is a joint estate for life in the first takers with a remainder. The estate by the entirety declared to have been created here is then an estate by the entirety for life, with a remainder.

(b) *There is reason why a remainder in severalty should not be implied where a husband and wife take an estate by entirety for life.*

1. No such remainder has ever been recognized in the innumerable cases before the English court. In Ex parte Tanner, it is said:

"If lands were given to a man and woman, and the heirs of their bodies, this would be an estate in special tail (Littleton's Tenures, S. 16), and the word 'respective,' if introduced before the word 'heirs,' would have the effect of making the man and woman *joint tenants for life.*"

continuing:

"I must confine the application of the word 'respective' to the inheritance given after the estate to the children. If the devise had been to the children and the heirs of their bodies respectively, I should have held them *tenants in common in tail.* Here the expression 'respective' is limited to the inheritance, and these are fit words to create a joint estate *for life*, with several estates of inheritance in tail."

Ex parte Tanner, ubi supra.

So also the cases cited in Elphinstone on Interpretation of Deeds, page 235, would indicate that except where both take an estate tail, as in *Denn v. Gillot,* 2 T. R. 431, the husband and wife do not take an estate by the entirety.

2. The tenure of an estate in the entirety is quite different from a joint estate, and still more so from a tenancy in common. The husband and wife are seized *per tout* but not *per my.* Each joint tenant can alien his interest; a tenant by the entirety cannot. The former can sever their estates, the latter is inseverable. The former can have partition, but

not the latter; and it is questionable whether divorce proceedings affect it.

"The estate of joint tenants is a unit made of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case, there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased co-tenant. In the last case, though there are two natural persons, they are but one person in law, and upon the death of either, the survivor takes no new estate. It is a mere change in the legal properties of the person holding, and not an alteration in the estate holden."

Stuckey v. Keefe's Ex'rs, 26 Pa. St. 399, 18 Am. Dec. 378.

Den v. Hardenbergh, 18 Am. Dec. 378 (Note).

So the abolition of tenancies in common does not affect the estate by the entirety. They are not repugnant to the genius of the republic. (Id. 380.)

"a grant to husband and wife was not considered in the same light as a grant to other persons; for that if a joint estate be made to husband and wife, and a third person, the husband and wife have but one moiety; and the third person will have as much as them both; because the husband and wife are but one person in law."

Co. Lit. 107, Fearne, p. 40.

Again Mr. Fearne observes that a limitation to the

heirs of their bodies following a joint limitation to husband and wife must be of the same quality, that is, a joint limitation.

Fearne, p. 37.

The limitation in this devise is clearly not joint, and therefore, must be a remainder and not a limitation of the precedent estate. Aside from this, it is inconceivable that there should be a separate interest in either tenant by the entirety during the existence of that estate. Such an interest would be directly opposed to the theory of seizin, which is *per tout.* On the other hand, there is nothing inconsistent with there being a contingent remainder in the heirs of the body of either at the termination of the estate by the entirety for life. The former interest is a vested interest; the latter interest is a contingent interest and therefore not inconsistent with the common law theory of an estate by the entirety.

(c) *That Kahakuakoi (w) and Kealohapauole (k) took for life only, and that the testatrix intended to devise the remainder to those persons then living, who should be of the blood of both, or either by another; in default of such issue to the trustees, is strongly indicated by a careful analysis of the several provisions of the two clauses.*

1. By her provision in the same clause "unto Kahakuakoi (w) and Kealohapauole, her husband, and

to the survivor of *them*" of an annuity "so long as *either* of them may live."

2. The devise is "unto *them*," viz: unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of *them* * * * so long as either of *them* may live.

3. The remainder is devised "and to the heirs of the body of either," and while the words "and to" are not decisive, they are often words of demarcation indicating a devise over, and this is so recognized by Judge Frear in the Rooke case. Their importance is accentuated by an examination of the will. In every case in which the testatrix gives the whole estate, she says, as in Clause 13, "*unto* the trustees below named, their heirs and assigns forever." Clause 16, her personal property to her husband, "*to* him, his executors, administrators and assigns forever," and First Codicil, Clause 9, of Moanalua to S. M. Damon, "*to* him, his heirs and assigns forever," in no case using the words "and to" before the words heirs or executors, while in the will she uses the word "to" as meaning "devise to" the trustees, fifteen times. Their importance is further emphasized by use elsewhere in the clause; the devise to the first takers is "*unto* them"; to the trustees "*to* my trustees." Is it not reasonable to suppose that "*to* the heirs of the body of either" had the same force in the mind of the testatrix?

4. The words of the Codicil (Tr., p. 87) "to have and to hold as limited in said fifth article of my said will" adds some force to this. The limitation in

terms refers to the entire fifth article. Again there is no devise to Kahakuakoi and Kealohapauole specifically, as expressed in the codicil in the will; it is "unto them," and the "them" referred to is to be found by reference to the recipients of the annuity, which is given "so long as *either* of them may live." When there is added the fact that it is conceded that the immediate devise is of a life estate to Kahakuakoi and Kealohapauole by the entirety, that is to say, "so long as *either* of them may live," the most reasonable supposition is that the limitation referred to is the devise over "to the heirs of the body of *either*" and "upon default of issue the same to go to my trustees."

(d) *This conclusion is made clear by the words of explanation "of either," and the devise "upon default of issue" to the trustees.*

The decision holds that these words indicate that the heirs of the body of one spouse by another, who would, therefore, not be the heirs of the body of the other, would take "upon default of issue" clearly means, and this is not questioned by the courts, a default of issue of *either,* at the termination of the precedent estate. Whether the words be construed as words of purchase or of limitation, the succession prescribed by the will is to the heirs of the body of either, that is to say, the heirs of either or both, which includes the children of either spouse by another. Therefore, the succession, whether by pur-

chase or by limitation at the death of the survivor of the entirety would be as follows:

"1. The survivor leaving heirs of his or her body, the deceased spouse having left none, the heirs of the body of the survivor take.

"2. Both Ka. and Ke. leaving heirs of the body, the heirs of the body of both take, not the heirs of the body of the survivor.

"3. The survivor leaving no heirs of the body, the deceased spouse having left heirs of the body then surviving, the latter take."

If the right of heirs of the body vests at the death of the predeceasing spouse, as the court holds, then heirs of the body of the predeceasing spouse, dying before the surviving spouse, their heirs or devisees, would take an interest, the whole in case the survivor left no heirs of the body, a share in case the survivor left heirs of the body, but such is not our construction of the clause.

Certainly (2) and (3) present a difficulty. The decision meets this by saying that there can be an estate by the entirety with several inheritances. There is no authority for this in the books, and the authorities which are cited do not sustain this proposition, but hold that where the devise is to the *respective* heirs of their bodies after a devise to joint tenants for life, in cases where the devisees for life are not and cannot become husband and wife, the remainder will be construed to be a tenancy in common in tail in the first takers, subject to the joint estate

for life. (Jar. on Wills, Vol. 2,* 252; *Doe v. Green,* ubi supra ;Ex parte Tanner.) Ex parte Tanner, in a dictum, goes a little farther and refers to Littleton's Tenures, s. 16, as authority for the proposition that the same result would happen where the devise was to the husband and wife and their *respective* heirs of their bodies, which approaches more nearly to this case, but seems to have been overlooked by the court. The difficulty in applying these cases is, that the word used here is not "their respective" but "of either." It is easy to see how the court fell into error. The former words do "not refer to the first takers," although they may "affect the estate devised to them" and may relate "only to the inheritance" (Tr., p. 56). The words "of either" clearly refer to the first taker, affect the estate devised to them if they take the estate the decision calls for, and do not relate only to the inheritance. Again, their position is significant; it is not "either's heirs of the body," but the "heirs of the body of either." Still more decisive is the reason that "respective" and "respectively" are

"Words of severance. Occurring in a testamentary gift to more persons than one, their effect is to sort out the devisees or legatees so that they take as tenants in common."

Bouvier's Law Dictionary.

While "either" is not a term of severance, but is sometimes used collectively and sometimes distributively,

The Illinois court said:

"The word 'either' is sometimes used in the sense of one *or* the other of several things, and sometimes in the sense of one *and* the other. Its use in this last sense is not infrequent. Thus it is common to say on either hand, or either side, meaning, thereby, on each hand or side."

And held that on either side meant on both sides of a right of way.

Chidester v. S. & I. S. E. R. W. Co., 59 Ill. 87, 89.

Where a paving ordinance contained the following clause: "Said curbstone to be set on either side of the roadway," the same court said:

"In Webster's definition of the word 'either' will be found the following: '2. Each of two; the one and the other.' Under this definition, the language of the ordinance, 'said curbstones to be set on either side of the road-way,' would require them to be set on both sides. Indeed, the language used in the first part of the section, requiring the roadway 60 feet on the north to be curbed, shows plainly enough that it was intended by the provisions of the ordinance that both sides of the roadway should be curbed."

C. & N. P. R. Co. v. Chicago, 172 Ill. 66, 49 N. E. 1006.

and again:

"In Sec. 155 of the practice act of 1903 (Mott, p. 79), the provision for reserving the right to trial by

jury is permissive in *either* party, and obviously means that *both* parties may make such reservation."

T. Harrington's Sons Co. v. U. S. Express Co., 87 N. J. L. 154, 93 Atl. 697.

Our own court has recently held that:

"The word 'either' is sometimes used in the sense of 'any.' 14 Cyc. 1232 (citing authorities). It was used in the sense of any of three in the second paragraph of this very will in the sentence 'if either of said daughters shall then be dead.' "

King v. Hawaiian Trust Co., Ltd., 21 Haw. 619, 622.

The difference between "either" and "respective" is illustrated by the reference in *Doe v. Green,* to *II* Coke on Littleton, Sec. 283, where in the case of lands given to two men "and to the heirs of their two bodies begotten" the court say that of necessity this must mean "their *several* and *respective* heirs of their body."

Not only does a devise to A and to the heirs of the body of A and B constitute a life estate and contingent remainders (*Denn v. Gillot,* ubi supra), but where the devise is to A and to the common heirs of the body of A and a husband or wife, this constitutes a life estate and a contingent remainder in the issue. Since, while the heirs of the body of A, they are also heirs of the body of the husband or wife (*Frogmorton v. Wharrey,* 2 Wm. Bl. 728, 731, 3 Wilson, 125,

144; *Gossage v. Taylor,* Stiles Rep. 325; *Lane v. Pannel,* 1 Roll. Rep. 230, 317, 438. Fearne, p. 212).

"It is not enough that the limitation should be to the heirs of the person having the particular estate and of another who might have a common heir of their bodies."

Mudge v. Hammill, 21 R. I. 283, 32 Atl. 544; 79 A. S. R. 802, 805.

Dawson v. Quinnerly, 118 N. C. 188, 24 S. E. 483, 484.

We will not cite further American cases, but will reserve them under another head. While we will deal more fully with the point when discussing the Hawaiian law and the American cases, we think at common law the devise to the trustees "upon default of issue" strongly indicates an intention to make alternate limitations upon the termination of the first estate by the entirety upon the death of the survivor, or what is termed a contingency with a double aspect, or a devise upon two alternative contingencies (*Ninia v. Wilder,* 12 Haw. 104; Fearne on Remainders, p. 43). It is only necessary to hold that the testatrix used the word "issue" and "heirs of the body" in the sense of issue (she certainly so used them) to bring the devise within such cases as *Lodington v. Kime,* sometimes cited as *Luddington v. Kime,* 1 Salk. 224, 1 Ld. Raym. 203, cited with approval by the Hawaiian court in *Ninia v. Wilder* and by the Supreme Court of the United States, *De Vaughn v. Hutchinson,* 165 U. S. 564.

An estate by the entirety in tail can be in special tail or in general tail, and without the words "of either" this devise would undoubtedly give an estate tail general to the survivor, which result curiously enough, is attributed by the court to the addition of the words "of either"! Giving, therefore, due weight to these words particularly when taken into conjunction with the devise over, in the absence of issue of either, is it not clear that at common law the devises at the termination of the estate devised to the first takers are alternate contingent remainders to the heirs of the body of either or to the trustees, and not separate moieties in tail in the first takers with cross remainders and a contingent remainder upon an indefinite failure of issue?

The fact that one is compelled to insert the words "for life" after the words "of devise" to Kahakuikoi and Kealohapauole, does not change the posture of the case. Judge Story says of this in a case where the devise was to A and "to his male children lawfully begotten of his body and their heirs forever, to be equally divided," holding this to be an estate for life to A and a remainder in fee to his male children, that "where the estate is indefinite the party takes for life only, unless a different intention be clearly indicated," and again "where words of devise are used giving an estate to A and then to B, no one would doubt that the estate to A would be a life estate, although not so expressly limited." (*Sisson v. Seabury,* 1 Sumner 235, 244.)

This is an ancient rule and so in a devise to A and the heir male of his body lawfully begotten * * * and if A dies without leaving any son of his body lawfully begotten, then over, it was held following the *Archer's Case* (1 Rep. 66a) that it was a life estate and remainder and the fact that there was no express life estate

"seems hardly sufficient to take the case out of the effect of a rule founded on an intention manifested by the testator of making the person who shall fill the character of heir male the origin or stirps of a new line of descent differing from the one which would arise from the use of the words heir male of the body or heirs male of the body."

Chamberlayne v. Chamberlayne, 6 Ell. & B. 625, 635.

The court in the case just cited commented on the fact that a life estate is of less importance than subsequent words, showing that "the first clear words of inheritance 'heirs of the body' " were intended to be the origin of a new line of descent.

It takes slight words of explanation to change a fee tail into a devise over, thus "share and share alike if more than one," with a devise over "in default of issue to be lawfully begotten by me."

Gretton v. Haward, 6 Taunt. 94, 128 E. R. 968.

so "as tenants in common with a clause in default of issue."

Browne v. Holme, 2 Wm. Bl. 777, 96 E. R. 454, 6 (Note).

"share and share alike" and "their heirs and assigns forever,"

Right v. Creber, 2 B. & C. 866, 108 E. R. 322.

The "first, second, third, fourth and every other son successively" with a devise "in default of such issue."

Lawe v. Davis, 2 Strange 849, 93 E. R. 892, 2 Ld. Raym. 1561, 92 E. R. 511.

"equally to be divided and to take as tenants in common" with a devise over "if devisee should die without such issue."

Crump v. Norwood, 7 Taunt. 362, 129 E. R. 145, 148.

"as well females as males and to their heirs and assigns forever, to be equally divided between them as tenants in common." (*Doe v. Laming,* 1 Wm. Bl. 265, 96 E. R. 146; *North v. Martin,* 6 Sim. 266, 58 E. R. 593.) Here the immediate devise was to the husband and wife and to the survivor, with special tail to the heirs of the body of the husband begotten of the wife, and the tenancy in common was, if there were more than one child.

The rule at common law deducible from these cases is well put by Mr. Justice Blackstone in *Perrin v. Blake,* Har. Lt. 489, 504, E. R. Cases, Vol. 10, 707, but the test is "how those heirs were intended to take whether as descendants or as purchasers." We respectfully urge that even at common law the estate devised being an estate by the entirety, the descent of which would be to the heirs of the body of the sur-

vivor where the descent may be to the heirs of the body of the other and another, or the heirs of the body of the survivor and another, and where these heirs clearly take as tenants in common not as joint tenants they must take by purchase and not by descent.

The failure to specifically declare the estate has never been decisive (*Chamberlayne v. Chamberlayne,* ubi supra). In addition to the cases already cited, may be cited *Doe v. Burnsall,* 6 T. R. 30, 101 E. R. 419; *Lawe v. Davis,* ubi supra; *Doe v. Laming,* ubi supra.

III.

EVEN IF THE DEVISE WOULD BE CONSTRUED AS AN ESTATE TAIL AT COMMON LAW, SUCH CONSTRUCTION WOULD NOT BE IN ACCORDANCE WITH THE CURRENT OF JUDICIAL DECISION IN THE UNITED STATES, EVEN WHERE THE COMMON LAW PREVAILS.

"In the United States the tendency is to reject what are considered rules of property in England if out of joint with the times, and to suffer rules of construction to yield readily to the manifest intention of the testator. * * * There exists even greater reason for departure from or failure to adopt English technical rules or precedents here than in the United States."

Rooke v. Queen's Hospital, ubi supra.

The common law is ascertained in Hawaii under the Act of 1893 (R. L. Haw. 1915, Sec. 1) by American, as well as English decisions. Under the English decisions, in many cases, the apparent intention of the testator yielded to fixed legal meanings given to words by the courts held to be the safer rule. Such is not the law generally in America, and certainly not in Hawaii.

Thus many English decisions cited by Jarman in regard to superadded words of limitation (not words of explanation) are arrived at by rejecting words or giving less weight to words which may express the intent of the testator, but which are rejected under common law rules as being inconsistent with the fixed meaning which the law gives to the words "heirs of the body" as creating an estate tail, even if such is clearly against the intention of the testator, chiefly under the rule in *Shelley's Case.*

In America, these cases would not generally be followed. Thus, where the words were "to such issue, their heirs and assigns forever," the issue was held to be the "springhead of a new and independent stream of descents."

Daniel v. Whartenby, 17 Wall. 639.
Green v. Green, 23 Wall. 486.

In a case similar to those cited by Jarman, "to her heirs begotten of her body and to their heirs and assigns," it was held, repudiating the English cases, that the children "become the root of a new succession, and take as purchasers and not as heirs."

De Vaughn v. Hutchinson, 165 U. S. 564.

De Vaughan v. Hutchinson, as well as *Green v. Green,* raise another consideration, that the word "issue," which is used in this devise interchangeably with "heirs of the body," is a less technical word and at common law yielded more easily to a supposed intention of the testator to benefit the issue, and so while the addition of the words "their heirs" to a devise to A and the heirs of his body would at common law be construed as an estate tail, as shown by the cases cited by Jarman, where the remainder is to his issue, "with words of limitation superadded, the word 'issue' will in that case be construed to be a word of purchase."

6 Cruise, Dig. 3d Am. ed. 259.
Luddington v. Kime, 1 Ld. Raym. 203.
De Vaughn v. Hutchinson, ubi supra.

Mr. Justice Shiras says in the latter case that whether *Luddington v. Kime* has been overruled in England is immaterial, that there is no decision in this country which questions the rule. The learned justice also quotes from a case in 3 App. D. C. 50:

"It is certainly a well-settled principle in the law of real property, indeed as well settled as the rule in *Shelley's Case,* 1 Coke 88, itself, that where an estate is expressly devised to a person for life, with remainder to the *heirs of his body,* and there are words of explaantion annexed to such word 'heirs,' from whence it may be collected that the testator meant to qualify the meaning of the word 'heirs,' and not to use it in a technical sense, but as descrip-

tive of the person or persons to whom he intended to give his estate, after the death of the first devisee, the word 'heirs' will, in such case, operate as a word of purchase."

and cites from *Daniel v. Whartenby*:

"But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail."

concluding:

"The word 'heirs' in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as 'heirs.' But the devise here was to Martha Ann for life, and at her decease to her heirs begotten of her body and to *their* heirs and assigns—a restricted class of heirs—and this limitation shows that it was the intention of the testator that Martha Ann's children should become the root of a new succession, and take as purchasers and not as heirs."

Now, if the use of the superadded words "their heirs and assigns" makes the children the root of a new succession and take as purchasers, because those words show a restricted class of heirs, surely in this case, where persons who are not the heirs of the body of the survivor may take and where the taking is in entirely different proportions, it must be held that

the root of a new succession is formed and that the words are words of purchase.

The West Virginia court has applied this rule in holding that in a devise "for themselves, and after them to their heirs," although "heirs" is usually a word of limitation, yet such words are easily construed to be words of purchase.

Irvin v. Stover, 67 W. Va. 356, 67 S. E. 1119.

"While it is true that courts will respect and enforce the technical meaning of 'heirs' or 'heirs of the body,' so as to make them strict words of limitation, after a life estate to the ancestor, where there is nothing to show that they are not used in a different sense, there is a disposition, *especially since the abolition of estates tail,* to seize upon slight circumstances to make them words of purchase. *May v. Ritchie,* 65 Ala. 602; *Price v. Price,* 5 Ala. 581; *Williams v. McConico,* 36 Ala. 22; *Dunn v. Davis,* 12 Ala. 140; *Watson v. Williamson,* 129 Ala. 362, 30 South. 281."

Findley v. Hill, 133 Ala. 229, 32 South. 497, 498.

So in a later case that court construed "heirs" to mean children, citing 30 Am. & Eng. Ency. Law (2d Ed., p. 667).

" 'When a will fairly construed is susceptible of two constructions, one of which would render it inoperative and the other give effect to it, the duty of the court is to adopt the latter construction."

Castleberry v. Stringer, 176 Ala. 250, 57 So. 849, 850.

So in Pennsylvania a devise "heirs or issue lawfully begotten on the body of the said G.," are not words of limitation, but gave "children a distinct and independent interest as tenants in common."

Nebinger v. Upp, 13 Serg. & R. 65, 69, 70.

So "his lawful heirs born of his wife," held that the heirs of their common body take a contingent remainder. *Thompson v. Crump,* 138 N. C. 32, 50 S. E. 457.

That court also held that the rule in *Shelley's Case,* that the words heirs of the body should be construed as words of limitation, only applies where "the same persons will take the estate whether they take by descent or purchase, in which case they take by descent" (*Howell v. Knight,* 100 N. C. 254, 6 S. E. 721, 722), and in another case where the heirs of the body of the wife were limited to those by her present husband, it was held that the heirs took by purchase; *Dawson v. Quinnerly,* 118 N. C. 188, 24 S. E. 483, 484; see also *Patrick v. Morehead,* 85 N. C. 62, 39 Am. Rep. 684, 688; *Bird v. Gilliam,* 121 N. C. 326, 28 S. E. 489, 490.

The Federal Court in Georgia has held that a devise to A and her heirs "and if A should die without issue living at her death, then in default of such issue, to E." Held that the word "heirs" was construed by the defining word "issue" and the alternative phrase in default of such issue, that it was A's

heirs of the body who took an estate by devise under it. *Myrick v. Heard*, 31 Fed. 241, 243-4.

Somewhat like the case at bar is an Ilinois case, of a deed between A and B, party of the first part, and C and D, his wife, "during their or either of their natural lives, and in fee to the heirs of the said C and his wife, the party of the second part," where, by the deed the property was conveyed "unto the said party of the second part, their heirs and assigns * * * to have and to hold * * * said land * * * unto the said party of the second part, their heirs and assigns forever." C and D had children, and the court held said party of the second part to include the heirs, and that "the heirs" mean heirs of the body of the two, and that the deed passed a life estate and a remainder in fee in the heirs of the body.

Hall v. Hankey, 174 Fed. 139.

So in Illinois a devise over to the heirs of the body, their heirs and assigns; held that this indicated the individuals who would be heirs of the body at the decease, and therefore they took by purchase.

Aetna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N. E. 669.

IV.

WHATEVER THE DEVISE WOULD HAVE CONSTITUTED AT COMMON LAW, UNDER THE HAWAIIAN SYSTEM, THIS DEVISE SHOULD BE CONSTRUED AS A LIFE ESTATE

IN THE FIRST TAKERS AND ALTERNATE CONTINGENT REMAINDERS IN THE CHILDREN, OR THE TRUSTEES.

The last of the Kamehamehas dying makes her will. She has many dependents on her bounty, but so far as the evidence shows, only one family of relatives. Kahakuakoi was her cousin and not only was she dependent on Mrs. Bishop's bounty, but so also were her husband and their children, Niulii, Lydia and George, who lived with Mrs. Bishop. Kahakuakoi was not beyond the age of child bearing, and in fact had children born after the making of the will, who have since died. Pauahi provided for many friends and many dependents and in all instances save one, apart from the gift of some personal property to her husband, the provision was for life only and the property then reverted to the trustees. When the testatrix made provision for these dependent relatives, including the grandfather, grandmother, the mother, uncle and aunt of the plaintiff, she made a different provision, which the Circuit Court and the Supreme Court of Hawaii held constitutes an estate by the entirety in the first takers and which was "intended to create an estate other than a fee simple" for which "No authority exactly in point has been found" (Tr., p. 46), but held that the testatrix did not intend to create a "life estate or estates and remainder" because she had elsewhere shown that she knew how to express an intention to create a life estate and a remainder, and cites a devise in the fifth

paragraph of the first codicil to K. and H. his wife "to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees upon the trusts named in my said will (Tr., p. 86), and concludes that the testatrix intended an invalid and impossible gift, viz: an estate by the entirety in tail with several inheritances. This reason does not seem sufficient because the testatrix had in mind in this instance third parties as the then objects of her bounty for whom she wished to provide. In the case cited by the court the trustees were to take absolutely; in this case they were to take only when husband and wife both left no heirs of the body, or, as the will puts it, "upon default of issue," and so she inserted the words "unto them," viz: upon the same devise as she had given to the other husband and wife "*and to* the heirs of the body of *either*." This is a plain, obvious and reasonable construction, but when the further consideration is added that the devise, as construed by the court, creates an invalid estate which has "no place under the laws of Hawaii," "was never a part of that system," "or imported into these Islands," "repugnant to the policy of free alienation of property," "out of place," "of which there is no instance of recognition * * * or of their concomitants, such as fines and common recoveries in the history of these Islands" whose statutes "conflict with the idea of the existence of estates tail," and then the court converts this estate tail into a fee simple which the tenant could dispose of by will, could alienate, in which

the heirs general take, whereas under the estate tail (the intention to create which is imputed to the testatrix), the tenant could not dispose by will, could not alienate or cut off the heir and in the descent of which males were preferred to females, and the eldest male and his descendants to younger males, in which all descendants took *per stirpes,* the result does not commend itself to reason. The necessities of the case go farther than this. If the intention on the part of the testatrix was to create an estate tail by the use of the words "of either" and the devise over to the trustees, she also intended to create cross remainders, an estate which does not come by descent, but by purchase; remainders which the decision of the court wipes out with one fell sweep, and in doing so converts the devise over to the trustees from a contingent remainder into an executory devise, because having converted the present estate into a fee simple the only way which that devise can take effect is by an executory devise, which the court also finds was not intended since the intention is imputed to Mrs. Bishop to create an estate tail, in which case the devise would be a contingent remainder. We must go farther, and since the testatrix must have known that the estate tail, which she had in mind, was impossible under the law of Hawaii, and assume that she deliberately created an invalid, impossible and unheard of estate and then left it to the court to "approximate" what should be her will. As a matter of law this clause is the language of the testatrix, and as a matter of fact we would court the

opportunity to prove that it was her language and not that of the scribe, who drew the will, but Judge Hatch, who presumably drew the will and the codicil, knew that an estate tail was impossible in Hawaii; he knew that it had never been heard of; he knew that it was invalid; and more than that, he was born and trained in a jurisdiction which repudiated estates tail as inconsistent with the American system, and declared that "Any attempt, therefore, to limit the descent of estates here to any other course of descent must be futile," in a case relied on by Judge Frear in the Rooke case, *Jewell v. Warner,* ubi supra.

Estates tail were absolutely unknown in Hawaii, but contingent remainders were not. They were a natural method of devising a remainder after a life estate, and there was nothing in reason which would prevent alternate contingent remainder. (*Ninia v. Wilder,* ubi supra.) It is, therefore, reasonable to suppose that the testatrix after having made up her mind to devise to the husband and wife for their lives and the life of the survivor, which is the present devise according to all constructions, intended, and did devise the remainder to the heirs of the body that either might leave and if neither left such heirs of the body, then to the trustees, since the objects of her bounty were exhausted. Such a construction should be adopted because it is a reasonable construction and construes the devise as a lawful devise, providing for the objects of her bounty, and providing for them in the order which she must have intended. A

construction adopted by the court is confessedly not the intention of the testatrix; it confessedly defeats that intention, and should not be adopted, not only for that reason, but because it imputes to her an intention to create an estate which she did not know of, and which, if she did know of, she would have known was invalid.

(a) *The holding "that the intention of the testatrix was to create * * * an estate in tail" and that there was "no doubt as to what the testatrix intended" is untenable.*

We observe that this is not a holding that the devise at common law would create a fee tail, but that the testatrix *intended* such an estate, which is, as we have said, inconceivable.

1. Such an estate must have been unknown to the testatrix, for the Hawaiian court can "find no instance of recognition of estates tail or of their concomitants, such as fines and common recoveries, in the history of these Islands.

2. The estate is a result of technical rules applied to a feudal system which never existed in Hawaii and founded on conditions that are practically obsolete elsewhere, and never existed here.

3. Estates tail have no place under the laws of Hawaii, and were never a part of that system. Whatever feudal system there was in Hawaii was abolished by the establishment of a land system in 1846, for the purpose of awarding land titles.

4. "The movement was in the opposite direction,"

and while "estates tail are repugnant to the policy of the free alienation of property" and out of place in the United States, here, where we are "one remove farther from Old England," they are still farther out of place.

5. Estates tail are inconsistent with the statutory laws.

6. An estate tail is absolutely inconsistent and characteristic of the fee simple recognized by those laws.

All these propositions are set forth in the learned opinion of Judge Frear in the Rooke case, and while the court in this case says something about a vague impression, which they do not seem to be able to put their finger on, or to state how prevalent it was, that fee tails existed in these Islands, and while the courts say that a fee simple and a fee tail "belong to the same genus" (whatever that may mean, for "genus" is a biological and not a legal term), we place against this vague understanding the decision in the Rooke case, which states the understanding of the bar and the understanding of the community at the time when this will was written, more accurately and more forcibly than we can do.

There are other reasons why, even if at common law these words might create an estate tail, they do not in Hawaii, and in this particular will.

7. The immediate devise being an estate by the entirety, is not susceptible even at common law, to remainders in severalty in the first takers; such remainders must be in others and not in the first tak-

ers, and this is clearly so in Hawaii under this devise.

In Hawaii a devise does not create a joint tenancy unless the word "joint" is expressly used. Joint tenancies were early repudiated on the ground that the common law was not in force; that they were opposed to the policy of the law; that there were no feudal tenures existing in Hawaii, and that a devise to two was generally understood and treated as creating estates in common (*Awa v. Horner,* 5 Haw. 543). On the other hand, estates by the entirety were commonly recognized in Hawaii.

Under a devise to:

"a husband and wife, they took neither as tenants in common nor as joint tenants, but by the entirety. *Paahana v. Bila,* 3 Haw. 725; *Wailehua v. Lio,* 5 Haw. 519; *Kuanalewa v. Kipi,* 7 Haw. 575."

Robinson v. Aheong, 13 Haw. 196, 197.

and remainders were well recognized: *Maughan's Will,* 3 Haw. 233, decided in 1870; *Zupplein v. Austin,* 6 Haw. 8, decided in 1867.

8. This being an estate by the entirety, the succession would be to the heirs of the survivor. The succession by this devise is limited to heirs of the body of the survivor, enlarged to include the heirs of the body of the deceased spouse by another, restricted by shutting out the heirs of the survivor not heirs of the body, in case the predeceasing spouse left heirs of the body then living, and again restricted by a provision that upon default of heirs of the body of either,

the trustees should take. This is the plain effect of the words of explanation "of either."

9. It is more probable that the testatrix intended a plain and simple estate by the entirety for life to the first takers and then if either left heirs of the body, they should take, and if neither of them had heirs of the body living at the expiration of the estate by the entirety, the trustees should take, estates well recognized in Hawaii, than that she intended at the death of the survivor that the two dead devisees for life should take an estate unknown to her, unknown in Hawaii, and invalid there, with cross remainders which were also invalid, which would also give estates in dower and curtesy to third persons not the object of her care, in order that this might be converted into a fee simple estate, which she did not intend, and the devise over to the trustees from a contingent remainder to an executory devise, which fee simple estate also would have dower and curtesy in any surviving spouse of the survivor, none of which was contemplated by the testatrix.

(10) The only reasons given by the court are two: One, that the testatrix knew how to give an estate for life with a remainder over, which we have met by showing that these were cases of remainders directly to the trustees. Here the interest of the heirs of the body is interposed between, and the fact proves nothing. The other is that there was a vague impression formerly that an estate tail might exist. How weak this is is illustrated by the history of this title.

The interest of the life tenants, which in fact endured until June 8, 1914, was foreclosed January 26, 1893, for $4700. On October 23, 1894, the purchaser, Charles R. Bishop, conveyed "his right, title and interest" to Mark P. Robinson for $6000 (Tr., pp. 76, 77). Robinson, who the day before had obtained from Kahakuakoi and Kealohapauole, George and Lydia for $5 a release of "all their right, title, interest and estate vested, contingent or in expectancy in * * * the same premises *devised to the parties of the first part by the will of Bernice Pauahi Bishop,*" with a further release of every right "vested, contingent or in expectancy" (Tr., pp. 96, 97), and that Robinson, thinking that the plaintiff was illegitimate and having this deed from the reversioners, conveyed with warranty for stock of the par value of $150,000 in the defendant on February 12, 1897, stock of which it is common knowledge that several times that value was realized. Compare the amounts and the unwillingness of the cautious Charles R. Bishop, whose wife had devised the land, to make anything more than a release, and the willingness of Mark P. Robinson to give a warranty deed after he had obtained a release from George and Lydia, the only "heirs of the body of either," as he supposed, to whom it had been devised.

(b) *The surrounding circumstances, the clear designation of the objects of the testatrix's bounty, and the language of the devise, compel the conclusion that the testatrix intended to provide for faithful depen-*

dents during their lifetime; that the estate should then go to the issue of either, who were also at the time of the making of the will, dependent on and the object of the testatrix's care, but in case, at the death of the survivor there was no living issue of either, then to her trustees.

The trial court declared that among the circumstances which the court should take into consideration were: "the relations between her and the devisees, between her and the children of the first takers, the dependence of the family upon her bounty at the time the will was made for their home and their subsistence" (Tr., p. 31), and found that "Kahakuakoi was a relative of Pauahi. The degree of relationship is not material, but is classed under the same generic Hawaiian term, which is best translated 'cousin.' That Kahakuakoi was always treated by Pauahi as a relative, living under Pauahi as one of her numerous retainers at the place known as Aikupika, with other retainers, relatives and servants of Pauahi" (Tr., p. 19). "Niulii was a kinswoman of Pauahi, a retainer about her house, and under the direct care and guidance of Pauahi. Niulii was a well known young woman. As one witness puts it, 'She was a girl who could not be hid.' She was of the blood of the aliis," "one of her own blood and of the blood of the aliis." "The testimony in the case shows that the plaintiff's grandmother was a cousin of the testatrix, and that the testatrix showed a personal interest in the plaintiff's mother and *a practi-*

cal interest in the welfare of the plaintiff herself." (Tr., p. 53.)

The objects of the testatrix's bounty are made clear by the language of the devise, which is "unto them," that is to say, *"unto"* Kahakuakoi and Kealohapauole "and *to the* survivor of them * * * so long as *either* of them may live" *"and to* the heirs of the body of *either" "upon* default of issue, the same *to* go to my trustees."

Three objects of the testatrix's bounty are here specified: "Kahakaukoi and Kealohapauole and the survivor," "the heirs of the body of either," "the trustees." In the devise to each she used the word "to" or "unto." In the devise of the annuity she uses both, using also the expression *"and to,"* the same which she uses before the words "heirs of the body of either"; "to" is a word which she used fifteen times to indicate a devise. On the other hand, when she made a devise in fee simple she did not use the words "and to" or "to" before the words "heirs and assigns."

(c) *The words "and to heirs of the body of either * * * upon default of issue the same to go to my trustees" are decisive in favor of alternate contingent remainders.*

1. The words "issue" and "heirs of the body of either" clearly mean the same thing. They mean issue who would inherit under the statute of distribution.

The words "heirs of the body" are like the word

"issue" (*Houghton v. Kendall,* 7 Allen 72, 76). The term means "such of the issue or offspring as may lawfully inherit" (*Waters v. Bishop,* 122 Ind. 516, 24 N. E. 161). See, also, *Coates v. Burton,* 191 Mass. 180, 77 N. E. 311.

2. The default of issue of either means a definite default of issue at the death of the survivor.

In *Hemen v. Kamakaia,* Judge Frear said:

"The words 'without issue' may mean a definite or an indefinite failure of issue. In a case like the present they would naturally be taken to mean a definite failure, for the popular idea certainly is that the words 'without issue' in the phrase 'die without issue' refer to the time of death."

Hemen v. Kamakaia, 10 Haw. 547, 554, 555.

and in the Rooke case, speaking of the words "on failure of issue," "without issue" and "without leaving issue," all of which are said to have been held to import an indefinite failure at common law:

"The presumption that these words import an indefinite failure of issue grew up under conditions that no longer exist and at a time when executory devises were not permitted at all. It is now generally conceded that the words 'without leaving issue' naturally mean 'without leaving issue surviving' and that to hold that they import an indefinite failure of issue would in most instances be in violation of the manifest intention of the testator. Accordingly, the rule supporting such construction has been abolished

by statute in England and in some of the United States. In other States it is either rejected by the courts or regarded as having so little force as to overcome by very slight expressions pointing in the other direction."

Rooke v. Queen's Hospital, ubi supra, p. 399.

Kent says of the statutes declaring for a definite failure that it is impossible not to feel relief and look with complacency at this final settlement by a legislative enactment.

4 Kent's Com. 281.

The defendant in the court below undertook to differentiate between the words used in the foregoing cases and such words as "upon default of issue" and "on failure of issue," but the Rooke case recognizes that there is no distinction between these expressions (p. 399), and it has been well said that under the common law

"'die without issue,' or 'in default of issue,' or 'for want of issue,' or 'on failure of issue,' or 'die without leaving issue,' import the same thing, to wit, an indefinite failure of issue."

Kay v. Scates, 37 Pa. St. 31, 78 Am. Dec. 399, 406.

At common law there was no distinction, and if one of these expressions now imports a definite failure of issue the others would.

3. Since the estate which the trustees would have taken is to be determined on a contingency at the

death of the survivor, the "heirs of the body of either" who are to take are persons who would then take as the heirs of the body of either, and these must then take as contingent remaindermen and not otherwise, for if the expression does not refer to the whole body of heirs, and include all the persons of all generations, but to those persons who would be heirs of their bodies at the decease of the survivor, the latter take by purchase and not by descent.

De Vaughn v. Hutchinson, ubi supra.

(d) *Even if the devise to the first takers be considered indefinite, the limitation over upon death to the trustees supports the construction that a life estate was intended to the first takers.*

Nothing is better settled in Hawaii than that

"An indefinite devise followed by a limitation over upon the death of the devisee would ordinarily be held to create a life estate in the first taker. *Paaluhi v. Keliihaleole,* 11 Haw. 101; *Mouritz v. Lewis,* 12 Haw. 19; *Robinson v. Aheong,* 13 Haw. 196, 200."

Paiko v. Boeynaems, 22 Haw. 233, 240.

If this devise had been an indefinite devise to Ka. and Ke., upon death to the trustees, the devise to Ka. and Ke. would be construed as a life estate. Where, as here, the immediate devise to them is not indefinite but must be an estate by the entirety for life, then to the trustees, unless either of them have issue, the more reasonable construction is that alternate contingent remainders are created in the heirs

of the body of either and the trustees, than that a vested estate of a different character, namely, a tenancy in common of an invalid character, namely, in tail, should be implied in the first takers who could never enjoy it.

(e) *The recent case of Brede v. First National Bank, 23 Haw. 537, construing the Rooke case, seems decisive that the words "heirs of the body of either" are words of purchase and not of limitation.*

The will in the Brede case devised all property to his wife for life and

"After the death of my said wife my property shall descend as follows:

"Unto my son, William K. Bailey, all those certain premises * * *

"If any of the devisees hereinabove in this will named shall die before my wife dies I then direct that the share that would otherwise have fallen to such person shall descend to the then heirs at law of such person."

William K. Bailey mortgaged the property to the defendant and died before the testator, leaving two daughters and a son surviving him. One of the daughters was the plaintiff. It was held, following the Rooke case, that whether William K. Bailey took a vested remainder, or an alternate contingent remainder with his heirs, was not necessary to determine; that the heirs took either by executory devise

after the vested remainder or by an alternate contingent remainder.

Brede v. First National Bank, 23 Haw. 537.

The word "descend" was used, which would indicate that the words "heirs at law" were words of limitation and not of purchase; the case at bar is much stronger in favor of an alternate contingent remainder.

V.

THE NAHAOLELUA AND BOEYNAEMS DECISIONS, REAFFIRMED IN THIS CASE, HOLD THAT A DEED TO A. AND THE HEIRS OF HER BODY CAN BE CONSTRUED AS EITHER A FEE SIMPLE OR A LIFE ESTATE AND CONTINGENT REMAINDER, AND THAT IF IT APPEARS THAT A FEE SIMPLE WAS NOT INTENDED, THE WORDS WILL BE HELD TO CREATE A LIFE ESTATE AND REMAINDER. IN THIS CASE BOTH COURTS HELD THAT A FEE SIMPLE WAS NOT INTENDED, AND THEREFORE THE DEVISE MUST BE HELD TO BE FOR LIFE WITH A CONTINGENT REMAINDER.

(a) *The Nahaolelua and Boeynaems decisions must be construed to hold that since the words in question can be construed either as a fee simple or a life estate and contingent remainder, if it appears that a fee simple was not intended, the words will be construed to create a life estate and remainder.*

In the Nahaolelua case there was a trust deed. The trustees conveyed to Elizabeth, the beneficiary

under that deed, with habendum to her, "party of the second, and the heirs of her body forever," in trust for her children born and to be born.

The court decided:

First, that the decision "depends solely upon the force and legal effect" of the second trust deed, since Elizabeth's right under the first trust deed was absolute.

Second, that the words "heirs of her body" would at common law technically create an estate tail.

Third, that under the Rooke case an estate tail cannot exist or be created in the Territory, so that the deed must be construed as granting a fee simple or a life estate and remainder, "according to which appears to most nearly carry out the intention of the testator"; that for this purpose all parts of the deed are to be considered, and that construing the deed as a life estate and remainder in fee simple to the heirs of her body

"*gives effect as nearly as possible to those formal parts of the deed, usually regarded as being sufficient, under the law, to pass title.* And, in this connection, we deem it pertinent to observe that the following provision, contained in the deed before us, reading: 'In special trust for the use and benefit of her said son Edward Nahonoomaui Kia, and such other child or children as may hereafter be born to her, and his or their heirs and assigns, forever as he or they shall arrive at the age of legal majority,' being repugnant and contradictory to the formal

parts of the deed, *must be disregarded. Simerson v. Simerson*, ante p. 57."

Nahaolelua v. Heen, ubi supra, p. 377.

The Boeynaems case, in which Chief Justice Robertson concurred, declined to reconsider the matter, the court saying:

"We are satisfied that the conclusion reached in the former case on each question presented, was correct."

Boeynaems v. Ah Leong, ubi supra, p. 700.

But one conclusion can be drawn from this: That the court held that as it appeared from the deed that a fee simple was not intended, the words would be construed as a life estate and remainder by reading in after the words "party of the second part" "for her life" and before the words "heirs of her body" "after her decease to," so that the clause would read "party of the second for her life, and after her decease to the heirs of her body forever." Obviously, this was not what Elizabeth intended. If the void trust clause is considered, as that clause shows that the formal parts of the deed merely intended a dry trust to Elizabeth for the use and benefit of her children, or at most a beneficial estate until they arrived at the age of legal majority, this clause does not (as said by the court in this case, which reverses the order of reasoning in the Nahaolelua decision, which says nothing of the kind) assist the court "how best to *approximate* the intention of the party"

further than to indicate that a fee simple was not intended. It indicates a far different interest than that "approximated" by the court.

The real difficulty in the Nahaolelua case arises out of the quotation from the Rooke case that in some states where fee tails do not exist such a devise "is considered one or the other according to which appears to most nearly carry out the intention of the testator," which is a hasty and inaccurate statement, for there are no such cases, and the decision at bar, which cites all the cases, shows this; for *Archer v. Ellison*, 28 S. C. 238, 5 S. E. 713, and *Pierson v. Lane,* 60 Ia. 60, were decided on the ground that a fee simple conditional was created and the condition had been fulfilled, an estate which the opinion shows cannot exist here.

In *Jewell v. Warner,* ubi supra, also cited in the Rooke case, the will was made in 1792, and the court held that as the statute of 1771 had been amended in 1789 so as to allow a free conveyance of estates tail, it had the effect of abolishing estates tail and making them fee simples. This case was decided in 1837, and in the same year the legislature enacted into law the very proposition.

Merrill v. American Baptist Missionary Union, 73 N. H. 414, 62 Atl. 647, merely held that the dropping out of this statute by the revision of 1867 did not revive a fee tail, but the devise in that case was held not to necessarily create at common law a fee tail.

We must confess to a little surprise that *Calder v. Davidson,* 59 S. W. 300, is cited at all. The case is

not reported officially, and the reasons, as we pointed out in the court below, are plenty. In that case the deed, as set forth in the opinion, is to "Mary Walker Calder and the heirs of her body by the said R. J. Calder."

The case cites to support its decision *Simonton v. White,* 93 Tex. 50, 53 S. W. 339, where "bodily heirs" were construed to be words of purchase and not of limitation, in spite of the rule in *Shelley's Case* which is in force in Texas, relying upon *Doe v. Laming,* ubi supra, and *Hancock v. Butler,* ubi supra, that an estate should be construed to pass the greatest estate to the first-named grantee which the instrument is capable of passing by fair construction; but in that case a devise "unto the heirs of their body," to be equally divided after the decease of a father and mother, was held to be a contingent remainder to the heirs of the body after the death of the survivor. Citing Indiana and Kentucky cases under statutes converting a fee tail into a fee simple, the court continues:

"If it cannot be held that the provision of our constitution forbidding the entailing of estates would have the same effect as has been given to the statute in Indiana, and enlarge the estate to a fee simple, we are of opinion that the case comes within the operation of the rule in *Shelley's Case.* The rule is in force in this state as a rule of law, and has been unhesitatingly enforced whenever the situation invoked its application. This rule, at the common law, did

not apply to instruments creating estates tail either general or special. Since by the language used the heirs of the body of Mary Walker Calder by R. J. Calder would have taken thereunder as heirs in indefinite succession, and since estates tail are forbidden, *we think the rule in Shelley's Case applies, and Mrs. Calder took the fee-simple estate.*"

We are astonished that the Hawaiian court should have cited a case basing its decision on the application of the rule in *Shelley's Case* to such a deed! *Rowland v. Warren,* 10 Ore. 129, also holds that fee tails do not exist in Oregon, but would create fee simple conditionals, the condition being complied with in the instant case.

We strenuously urge that under the general rules of construction referred to in the Nahaolelua case it is not possible that the court intended to lay down as a rule that in construing a will the court could guess at the intention of the testator and "approximate" whichever estate, fee simple, or for life with a contingent remainder, the court thought most fitting. As is said in the case at bar, courts cannot "conjecture." There must be some definite rule by which the Nahaolelua case is decided. There is nothing to indicate that the deed in that case was intended to create an estate tail. There is not a shadow to show that it was intended to create a contingent remainder in the heirs of the body, excepting the use of that expression. Whatever there was, showed a definite estate, namely, a beneficial interest in them, but this

clause the court say must be disregarded. It did appear that the deed was not intended to create a fee simple. Therefore the court must have held that it created an estate for life and a contingent remainder for this reason alone.

(b) *In the case at bar, where it is found by both the courts that the testatrix did not intend to create a fee simple, and where there are explanatory words showing that she did intend to create a life estate and a remainder, the ruling in these cases, reaffirmed by the court below, necessitates holding this devise to constitute a life estate in the first takers and contingent remainder in the heirs of the body of either.*

There was no "attempt to create an estate in fee tail" in the Nahaolelua deed. That was far from the intention of the parties, and the court in that case did not so hold. There is no more evidence of an "attempt to create an estate in fee tail" in this case, where necessarily the words used would not create an estate by the entirety in fee tail, but an estate by the entirety for life and a remainder, and the question is what that remainder would be. The resemblance consists in an attempt to give an interest in the property to the heirs of the body. What Elizabeth "might have done had she been advised that she could not create" the estate in trust for the children *is* "left to conjecture." In this case we submit there is no conjecture. She intended that the descendants of either of them should take the estate before the trus-

tees. This does "show a preference for a life estate and remainder."

If this be not so, yet as the court has found that the testatrix did not intend to create a fee simple, the estate should be held to be an estate for life with contingent remainder, under these decisions.

Again, the will in this case does not contain a "mere limitation to the heirs of the body"; it is "*and to* the heirs of the body of *either*," the decision shows that the words "of either" had a material effect upon the devise, and if the cases relied on are applicable, then the words "of either" change the immediate estate into an estate for life, create separate remainders in the first takers, cross remainders in the heirs of the body of either spouse, and curtesy and dower in third persons, as the result of this "futile attempt to create an estate in fee tail by the testatrix." This is as far as possible from a "mere limitation to the heirs of the body," and we believe equally as far from showing that the testatrix was indulging in a "futile attempt to create an estate in fee tail."

As it is admitted that the testatrix did not intend to give a fee simple, and did intend to give something else, if she was guilty of a "futile attempt to create a fee tail," why, then, she must have known that there was no method of docking an entail by a fine or common recovery or by a conveyance, and that conditional fees did not exist, and she must have thought that her "futile attempt to create a fee tail" would at least give an estate which would go at the death

of the first takers to Niulii and Lydia and George and any other children of either.

At first sight, the statement of the court that the provisions giving a power to the beneficiaries "to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years * * * the rent, however, after such decease to be paid to my executors or trustees," would seem to militate against plaintiff's theory, but it equally militates against the theory of the court, for, as we have shown, a life estate was given to Ka. and Ke. After their decease, leaving heirs of the body of either, the rents would clearly not be payable to the trustees under the court's theory of the estate. Whether that clause would authorize leases good against the trustees in case the trustees took at the death of the survivor upon default of issue is questionable; if it does the claim tends to support the plaintiff's theory of a life estate and remainder.

CONCLUSION.

We think we have established these propositions:

(1) The immediate devise is an estate by the entirety to Ka. and Ke. for life and the life of the survivor.

(2) The decision of the court must be construed as so finding.

(3) The inheritance of an estate by the entirety, if in fee, is in the heirs of the surviving spouse; if in fee tail, in the heirs of the body of the surviving spouse.

(4) The words whether of inheritance or purchase, "heirs of the body of *either* mean the heirs of either or both, which would include issue of either spouse by another (so found by both courts).

(5) In this devise "issue" and "heirs of the body of either" mean the same thing.

(6) The devise over takes effect at the death of the survivor only in case each of the spouses left no heirs of the body.

(7) The testatrix did not intend a fee simple in the first takers (so found by both courts).

(8) It is less reasonable to *imply a devise* and an intention of the testatrix to devise the reversion to the deceased father and mother by an illegal estate, with illegal cross remainders, and dower and curtesy to persons not the object of testatrix's care, which estates she must have known the law would convert into estates she did not intend, rather than construe the words "and to" as *devising the reversion* to the children also dependent and of her own blood.

(9) It is a possible and reasonable construction that the reversion after the life estate passed to the descendants of either, viz: "the heirs of the body of either," failing which, to the trustees.

(10) Between two possible and reasonable constructions, one creating a legal and the other an illegal estate, the testatrix will be presumed to have intended the legal estate and not the illegal one, and certainly not one unknown to Hawaii, repugnant to her policy, never imported into the Islands, and which she presumptively knew nothing of.

(11) Under the common law, in England and still more in America, the heirs of the body of either would take as purchasers and not by descent, the succession not being to the heirs of the body of the survivor, and a reversion in the first takers will only be implied when words of severance like "respective" are used.

(12) The devise to the trustees upon default of issue leads to the same conclusion, since these words must be construed as meaning a definite failure of issue, and therefore "the heirs of the body of either" do not mean the whole body of heirs, but those persons who were heirs of the body of either at the termination of the immediate estate, who would then take as purchasers.

(13) This conclusion is fortified by other expressions in the will.

(14) The Nahaolelua decision, reaffirmed, can only be sustained on the theory that an estate tail at common law would in Hawaii become a life estate and contingent remainder, or else upon the ground that wherever it appears that the testatrix had the heirs of the body in mind in making the gift so far as not to intend a fee simple in the first takers, these words should be construed as creating a life estate and contingent remainder.

We respectfully submit that this court should not sustain the decision of the court below, which holds that the testatrix should be presumed to have intended an illegal estate rather than a legal estate, and that the law would convert this illegal estate

into a legal estate which the testatrix did not intend, rather than a legal estate which would provide for the persons and in the order evidenced by the will.

We respectfully ask for a reversal and that judgment be directed to be entered for plaintiff on the facts found.

Respectfully submitted,

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